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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Earl R. Foster, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 490 F. 2d 55 and is printed as Appendix A, *infra*. The opinion and order of the district court, not officially reported, is printed as Appendix C, *infra*.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on December 26, 1973. The time

[1] The government is representing Mr. Foster in this litigation pursuant to 50 U.S.C. App. 459(d).

for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to and including May 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether vacation benefits based on the performance of certain minimum work requirements for the employer during the preceding year are perquisites of seniority to which a returning veteran is entitled under Section 9 of the Military Selective Service Act, 50 U.S.C. App. 459; and, if not, whether the veteran is in any event entitled under the Act to a pro rata vacation benefit based on his work for the employer before and after his military service for which vacation benefits would not otherwise be received from the employer.

STATUTORY AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *—
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay; or

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

The collective bargaining agreement provides in relevant part (Joint Appendix[2] in the court of appeals, 54b):

[2] Hereafter "J.A."

Article XIV, "Vacations."

Section 2 provides:

> In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31sts and has seniority on the current December 31st must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st. However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this Section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked twenty-five (25) weeks or more.

STATEMENT

Earl A. Foster was employed by the Dravo Corporation in August 1965. He worked for the company until he entered the military service on March 6, 1967. Upon completing his military obligation, he was reinstated on October 7, 1968, and worked 13 weeks during the balance of 1968. The company refused to give Foster a paid vacation in either 1968 or 1969, contending that he was not entitled to vacation benefits in those years since he had not met the eligibility provisions in the applicable collective bargaining agreement. The agreement provided that only employees with earnings from the company in at least 25 weeks of the preceding calendar year were entitled to benefits (App. A,

infra, p. 2A).[3] Such provisions are common in collective bargaining agreements.[4]

Petitioner filed suit in the district court alleging that the company violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459, by refusing to consider his military service in computing his entitlement to vacations after he returned to civilian work. The gravamen of his complaint was that under the collective bargaining agreement, vacation benefits were a perquisite of seniority since they accrued automatically to those employed by the company, rather than being in the nature of extra pay for work performed, and thus, on his return to his civilian employment, his eligibility for vacation benefits was to be computed "as * * * if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).

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[3] The courts below refer to petitioner's claim for paid vacation benefits for 1967 and 1968 (App. A, *infra*, p. 1A; App. C, *infra*, p. 20A). The "1967 benefits" are those available for use in 1968, while "1968 benefits" are to be used in 1969. Thus, petitioner received no paid vacation from his return in October 1968 until 1970, when his "1969 benefits" became available. He was paid his "1966 benefits" when he entered military service in March 1967 (J. A. 11).

[4] A survey of "virtually all agreements in the United States covering one thousand workers or more, exclusive of railroads, airlines, and government agreements" ("Paid Vacation and Holiday Provisions," Bulletin No. 1425–9, U.S. Dept. of Labor, Bureau of Labor Statistics, June 1969, p. iii) showed that almost 70% of such agreements required a specified minimum time, or percentage of available time, to be worked in the previous year as a condition of eligibility for vacations. *Id.* at 23.

After reviewing the collective bargaining agreement, the district court rejected petitioner's argument and held that he had not been denied any rights under the Act (App. C, *infra,* p. 21A).

On appeal, the court of appeals noted that at least two other circuits, the Ninth[5] and the Seventh,[6] had held that vacation benefits under similar collective bargaining agreements are a perquisite of seniority to which returning veterans are entitled.

The court stated that it was necessary to analyze the particular terms of each collective bargaining agreement to determine whether the parties intended that the benefits accrue automatically with employment and thus are seniority rights protected by the Act, or are in fact a form of deferred pay for actual work performed and thus are payable only to those who have performed the work. However, the court further stated that it was more reasonable to consider vacation pay "part of a worker's current or short term return for labor" (App. A, *infra,* p. 15A), while the seniority protected by the Act is only "a priority factor that normally serves to protect workers' long term interest in job security by determining preference in such matters as advancements, layoffs and rehiring" (App. A, *infra,* p. 15A). Although the court recognized that the contract language was ambiguous, it resolved the ambiguities against the veteran and held, "the terms of this collective bargaining agreement require twenty-five full work weeks, and Foster's failure substantially

[5] *Locaynia* v. *American Airlines, Inc.*, 457 F.2d 1253 (C. A. 9), certiorari denied, 409 U S 982.

[6] *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F.2d 128 (C.A. 7).

to comply in this case precludes his claim to full vacation benefit [footnotes omitted]" (App. A, *infra*, p. 17A). The court remanded the case, however, for the district court to consider whether petitioner was entitled under the collective bargaining agreement to a pro rata share of paid vacation benefits for the weeks he worked in 1967 and 1968, if the district court found that issue had been properly raised.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals, although in accord with the result reached by the Tenth Circuit in a similar case,[7] is in conflict—as the court below recognized—with recent decisions of the Ninth and Seventh Circuits. *Locaynia* v. *American Airlines*, 457 F. 2d 1253 (C.A. 9), certiorari denied, 409 U.S. 982; *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128 (C.A. 7).[8] Since the question of returning veterans' entitlement to paid vacation benefits under collective bargaining agreements similar to the one here

[7] *Kasmeier* v. *Chicago, Rock Island and Pacific R. Co.*, 437 F.2d 151 (C.A. 10).

[8] The court's suggestion (App. A, *infra*, pp. 11A–12A) that these cases might be distinguishable on the basis of differences in the terms of the collective bargaining agreements involved is unpersuasive. The agreements in both *Locaynia* and *Ewert* involved minimum work requirements which the veteran, because of his military service, could not satisfy. In *Locaynia*, vacation benefits were reduced for absences exceeding 60 days. This is equivalent to a work requirement of approximately 200 days. 457 F.2d at 1255, n. 5. The agreement in *Ewert* gave full paid vacations only to those who were present for work on all but 90 days of the preceding year, which is a work requirement of approximately 170 days. *Ewert* v. *Wrought Washer Mfg. Co.*, 335 F. Supp. 512, n. 1 (E.D. Wis.)

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is both important and recurring, this Court should resolve the serious conflict thta has developed among the circuits.[9]

Furthermore, the problem is proliferating. We are informed by the Department of Labor that there are 24 vacation benefits cases now pending in district courts throughout the country. Many of these cases involve more than one veteran. For example, in *Christiansen* v. *Kaiser Steel Corp.* (C. D. Cal., Civ. Action No. 73–2029–F), 32 veterans have been joined in the action. Included among the defendants are such national concerns as Norfolk & Western Railroad, Burlington Northern Railroad, Penn Central Transportation Company, and Atlantic Richfield. There are also 79 vacation benefits cases which have been re-

[9] The issue is currently pending in the Second and Sixth Circuits, *Lipani* v. *Bohack Corp.*, C.A. 2, No. 74–1471; *Howard* v. *Babcock & Wilcox*, notice of appeal filed March 6, 1974 (C.A. 6).

The district courts are also in disagreement. Three have held that veterans are entitled to vacation benefits as perquisites of seniority, regardless of compliance with work requirements:

Messina v. *Consolidated Freightways Corp.*, 315 F. Supp. 340 (W.D.N.Y.); *Kelly* v. *Chicago, Rock Island & Pac. R. Co.*, 293 F. Supp. 423 (W.D. Okla.); *Austin* v. *Sears, Roebuck & Co.*, C.D. Calif., No. 73–202–FW, decided May 25, 1973, currently pending on appeal, No. 73–2704 (C.A. 9).

Five have reached the opposite conclusion:

Tuttle v. *U.S. Plywood Corp.*, 293 F. Supp. 401 (D. Ore.); *Fees* v. *Bethlehem Steel Corp.*, 335 F. Supp. 487 (W.D. Pa.); *Young* v. *Southern Pacific Transp. Co.*, (C.D. Cal., No. 73–444–RJK, decided September 24, 1973; *Lipani* v. *Bohack Corp.*, 368 F. Supp. 282 (E.D. N.Y.), currently pending on appeal No. 74–1471 (C.A. 2); *Howard* v. *Babcock & Wilcox*, N.D. Ohio, No. C72–966, decided February 1, 1974, notice of appeal filed March 6, 1974 (C.A. 6).

ferred for litigation but which have not yet been filed. Included in this group are such potential defendants as United Air Lines, Weyerhauser Paper Co., Boise Cascade, Safeway Stores, Pan American World Airways and General Motors.[10]

Thus, unless this Court resolves the conflict, veterans who work under a single collective bargaining agreement for a nationwide concern with plants or other facilities in several States will or will not receive vacation benefits under the Act, depending upon the circuit in which the plant they return to is located.

2. The Department of Labor is of the view that those cases which conclude that the veteran is entitled to credit for his military service in determining his eligibility for vacation benefits after his return to his civilian employment correctly interpret this Court's decisions in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, and *Eagar* v. *Magma Copper Co.*, 389 U.S. 323.

Section 9(c)(2) of the Military Selective Service Act guarantees that the returning veteran is to be reemployed without loss of seniority, "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering

[10] We are also informed by the Department of Labor that the 287 vacation benefits complaints that were filed with the Department's field offices in the six-month period between July 1, 1973 and December 31, 1973, represent 18 percent of the total veterans' reemployment rights claims filed under the Act, up from an average of 11 percent of such claims over the prior three fiscal years. Moreover, there appears to be an increased reluctance on the part of employers to settle vacation benefits claims because of the conflict in decisions.

the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).[11]

In *Accardi,* the Court established the principle that "[t]he term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country." 383 U.S. at 229–230. Although recognizing that the severance payments at issue there were in some degree based on the employees' length of service with the company, the Court refused, for purposes of the Act, to treat them as compensation for actual work performed, because of the "bizarre results" possible under the governing agreement, which could result in employees being compensated equally for working a full year or for working only seven days in a year. 383 U.S.

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[11] The Act also provides that the veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence * * *." 50 U.S.C. App. 459(c)(1). The dissenting opinion in *Eagar* regarded this provision as controlling entitlement to vacation benefits. 389 U.S. at 325. But *Accardi* indicates that the "other benefits" provision was designed to provide for continuation of company benefits such as insurance during the period of military service. 383 U.S. at 231–232. Since petitioner seeks only to be paid for vacations occurring after his return to his civilian employment, the "other benefits" provision is not applicable.

at 230.[12] Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York, Inc.*, 490 F.2d 586, 590–591, n. 4 (C.A. 2), petition for a writ of certiorari pending, No. 73–1369.

Thus, the Court emphasized, it is necessary to consider whether the benefits are in fact conditioned on continuous employment by the company for the period indicated. If so, regardless of the labels attached to the conditions in the collective bargaining agreement, the benefits are protected by the Act. "The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it." 383 U.S. at 230.

Although *Accardi* dealt with severance pay, this Court has indicated that the same analysis also applies to vacation pay by citing *Accardi* in summarily reversing a holding that vacation benefits were not a perquisite of seniority. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323.[13]

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[12] Payments were based on years of "compensated service" with the company. A month of "compensated service" was one in which the employee worked at least one day, and a year of compensated service was "12 such months or a major portion thereof." 383 U.S. at 228.

[13] *Eagar* involved claims for both vacation and holiday pay. The veteran had met all the requirements for holiday pay, except that he had not, because of his military service, been on the company payroll for the three months preceding the holidays involved. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, 324 (Douglas, J., dissenting). There was thus in *Eagar*, as here, a failure because of military service to meet the work requirements for eligibility for benefits; but the Court nonetheless held the veteran entitled to the benefits.

When the *Accardi* analysis is applied to the instant case, the requirement in the collective bargaining agreement that vacation benefits depend on earnings in at least 25 work weeks in the previous year should be regarded as merely a means by which to make eligible for vacation pay all employees who were regularly employed during that year. Like the "compensated service" requirement in *Accardi,* it is not designed to provide deferred compensation for work performed during the qualifying year.[14] Thus, *Accardi* teaches, entitlement to vacation pay is a perquisite of seniority in the sense used in the Act, regardless of whether it is one of the traditional attributes of seniority identified by the court below (App. A, *infra,* p. 15A).

3. Even if the Court disagrees with our contention that, under *Accardi* and *Eagar,* petitioner is, in this case, entitled to credit for his military service in deter-

[14] Indeed, the possible results of considering the payments to be extra compensation are equally bizarre in both cases. Since the agreement here requires only "earnings" in each of 25 work weeks, an employee who works 25 hours—one hour in each of 25 different weeks—is entitled to the same vacation benefit as one who works the normal 2,000 hours per year. There is thus no more necessary correlation between the amount of work the employee performs and his entitlement to benefits than there was in *Accardi,* where the Court noted that either 7 days' or one year's work could result in the same entitlement. 383 U.S. at 230. On the other hand, it should, in candor, be pointed out that under our contention in point 2 of this petition there would be dramatic differences between veterans who entered military service in late December and those who entered in early January after working at their civilian jobs for at least one day in the new year, and similarly between veterans returning to their civilian jobs in late December and those returning in early January. No such disparities would exist, however, under our alternative contention in point 3 of this petition.

mining his eligibility for paid vacations after his return to his civilian employment, we submit that his right under the Act to pro rata vacation benefits based on his 9 weeks of work for the company in 1967 and 13 weeks in 1968 does not depend on whether pro rata benefits are available under the collective bargaining agreement.

The basic principle underlying Section 9 of the Military Selective Service Act is that "he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job.'" *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 170–171. This principle may not be undercut by contractual provisions in the collective bargaining agreement. *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U.S. 275, 285; *Accardi* v. *Pennsylvania R., supra*, 383 U.S. at 229.[15] Thus, regardless of the provisions in the collective bargaining agreement, petitioner has a statutory right to at least a pro rata amount of vacation benefits based on his actual civilian service.

Since the 9 weeks he worked in 1967 would have entitled him to 9/25 of the normal vacation benefit had he remained on the job that year instead of entering

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[15] Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York, Inc.*, 490 F. 2d 586, 592 (C.A. 2), petition for a writ of certiorari pending, No. 73–1369:

"The Act was premised on the recognition that the man in the military is not represented at the bargaining table and that any special status accorded veterans is an inconvenience to union and management alike. Veterans' Reemployment Rights Under Selective Service Interpretations, 54 Yale L.J. 417 (1945). * * *"

military service and since the 13 weeks he worked upon his return in 1968 similarly would have entitled him to 13/25 of the vacation benefit had he been on the job rather than in military service during the earlier part of that year, the Act, at a minimum, entitled him to a 9/25 vacation benefit in 1968 and a 13/25 vacation benefit in 1969.[16] Anything less would deprive petitioner of benefits to which he would have been entitled had he not entered military service, and this the Act forbids. Although the collective bargaining agreement may validly deny vacation benefits to employees on leaves of absence for other reasons by limiting the payment of pro-rata vacation benefits to certain situations,[17] the Act, in our view, prohibits the application of such a limitation to leaves for military service . . . and the judgment of the court below should, at a minimum, be modified accordingly.

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[16] Prorating the vacation pay in this way would avoid the possibility, which troubled the court below, that the veteran would receive a windfall if his military service, for which he received military leave, were also used to compute his elegibility for vacation pay (App. A, *infra*, pp. 16A–17A). See n. 14, *supra*. But see *Travis* v. *Schwartz Mfg. Co.*, 216 F. 2d 448, 454 (C.A. 7) ("compensation paid a veteran during his period of [military] service does not affect his rights under the Act").

[17] For example, the agreement here specifically provides that only employees who are laid off are entitled to prorata vacation benefits (J.A. 54b).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1974.

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APPENDIX A

United States Court of Appeals for the Third Circuit

No. 73-1083

EARL R. FOSTER, APPELLANT

v.

DRAVO CORPORATION, APPELLEE

On Appeal from the United States District Court for the Western District of Pennsylvania, D.C. Civil Action No. 71-781

Argued October 11, 1973

Before: HASTIE, VAN DUSEN and ADAMS, *Circuit Judges.*

Harlington Wood, Jr., Asst. Attorney General; *Richard L. Thornburgh*, U.S. Attorney; *Robert E. Kopp* and *Jean A. Staudt*, Attorneys, Department of Justice, Washington, D.C., Attorneys for Appellant.

Charles R. Volk, Robert H. Shoop, Jr., Thorp, Reed & Armstrong, Pittsburgh, Penna., Attorneys for Appellee.

Opinion of the Court filed December 26, 1973 by *Circuit Judge* ADAMS.

The issue in this case is whether under the Selective Service Act of 1967 an employee is entitled to full vacation benefits for the years he entered and returned from military service, under the terms of a collective bargaining agreement that conditioned the award of such benefits on the receipt of earnings during 25 weeks of the previous year.

Earl R. Foster, an employee of the Dravo Corporation since August 5, 1965, received a military leave of absence beginning on March 6, 1967. Shortly after completing his military obligation, he returned to the employ of Dravo on October 7, 1968. Foster thus worked for Dravo a total of nine weeks in 1967 and thirteen weeks in 1968.

The collective bargaining agreement between Dravo and Foster's bargaining representative, Industrial Union of Marine and Ship Building Workers of America, Local 61, requires that an employee, in order to qualify for full vacation benefits, "must have received earnings in at least twenty-five (25) work weeks in the twelve (12) months preceding the current December 31st." [1]

It is only on the basis of Foster's failure to meet the twenty-five weeks of work requirement that Dravo challenges his eligibility for vacation benefits.

The language and the overall scheme and purpose of the reemployment provisions of the Selective Service Act of 1967, 50 U.S.C. App. § 459, are determinative of the present dispute about a reemployed veteran's claim to civilian vacation pay on account of time spent in military service.

Section 459(b) requires that a returning veteran "be restored to the position vacated for military serv-

[1] Article XIV, section 2 of the collective bargaining agreement recites the conditions an employee must fulfill in order to receive vacation benefits. The relevant part of this section reads as follows:

> In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31st and has seniority on the current December 31st must have received earnings in at least twenty-five (25) work weeks in the twelve (12) months immediately preceding the current December 31st.

ice" or, as an acceptable alternative, "to a position of like seniority, status and pay." Because the parties have stipulated that appellee was restored "to the position [he had] vacated," the mandate of § 459(b) has been satisfied and there is no need in this case to consider the allowable alternative of restoration "to a position of like seniority status, and pay."

Rather, the controversy here arises out of the interpretation and application of § 459(c), which reads as follows:

> (c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored *without loss of seniority*, shall be entitled to participate in insurance or *other benefits* offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. (Emphasis added).

Subsections (c) (1) and (2) require that job seniority shall not be adversely affected by military leave, and that, for the purpose of various "other benefits"

enjoyed by employees under the employer's rules and practices, the reemployed veteran shall be treated as "having been on furlough or leave of absence" during his military service.

I

Much in this case turns on whether a particular incident of the employment relationship is regarded as falling under the "seniority" or the "other benefits" language of subsection (c)(1).

There is general agreement as to the differing import of the "seniority" and "other benefits" language of subsection (c)(1). If it is length of service that determines the amount or kind of emolument a returning veteran is to receive, it must be considered a perquisite of "seniority" and the veteran's time spent in the military is included when computing his length of service.[2] If, on the other hand, the particular incident of employment does not accrue simply because of length of service, it must be considered a "benefit" other than one based on seniority, and the returning veteran is entitled to the advantages only if he has met the other conditions.[3]

It is in determining whether a benefit is conditioned simply on length of service or something more that

[2] *See, e.g.* Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966); Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964). In Fishgold v. Sullivan Drydock & Repair Corporation, 328 U.S. 275, the court enunciated the "escalator principle" which assures that the veteran does not suffer because of his military service in terms of his length of service vis-a-vis fellow employees who do not serve in the armed forces. "[The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the point he would have occupied had he kept his position." *Id.* at 284–85.

[3] *See, e.g.*, Kasmeier v. Chicago, R.I. & Pac. R.R., 437 F. 2d 151 (10th Cir. 1971); Dougherty v. General Motors Corp., 176 F. 2d 561 (3d Cir. 1949).

difficulty is encountered. In deciding whether the "seniority" or "other benefits" language of subsection (c)(1) governs, we are guided by the Supreme Court's instructions in Accardi v. Pennsylvania Railroad Co.[4] to refrain from unreflective acceptance of the "labels" used by the employer and the union in describing the types of benefits contained in the collective bargaining agreement.[5]

II

Accardi has spawned a group of lower court opinions that, Foster contends, counsel reliance on strictly literal interpretations of the words of the collective bargaining agreement in determining whether a particular benefit, such as vacations, is to be considered a perquisite of "seniority" or to be placed in the category of "other benefits." In *Accardi* itself, which dealt with the issue whether time spent in the military should be included in computing an employee's severance pay, the Supreme Court did point out that under the contract there "bizarre results" were possible: "an employee [could] . . . receive credit for a whole year of 'compensated service' by working a mere seven days."[6]

The Court in making this illustrative statement, however, was not suggesting that so long as any conceivable, although possibly unrealistic, reading of an agreement requires only a minimal work requirement in order to be entitled to a particular benefit, such benefit must be regarded as a prerogative of seniority.[7] The language following the reference to the

[4] 383 U.S. 225 (1966).

[5] *See id.* at 229–30.

[6] 383 U.S. at 230.

[7] *See* Haggard, Veterans' Reemployment Rights and the "Escalator Principle," 51 B.U.L. Rev. 539, 571 (1971) (hereinafter cited as Haggard); Note, The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 149 (1966).

"bizarre result," indicates that the Court, instead, reached its conclusion much in the same way an arbitrator does, by considering not only the words of the agreement but also the meaning with which those words are imbued by the general and specific industrial relations milieu:

> The use of the label "compensated service" cannot obscure the fact that the *real nature* of those payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much more work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with seniority should receive the highest allowance since they were giving up more rights and benefits than those with less seniority.[8] (Emphasis added)

Undoubtedly the fact that the contract in *Accardi* had an express provision defining "compensated service" contributed, in some manner, to the result the Court reached. But it certainly would be ironic for the Supreme Court to direct lower courts to abandon the use of labels when deciding whether a benefit is a prerogative of seniority and at the same time direct that they replace such use with a strained and niggardly analysis of the terms of collective bargaining agreements.

Foster suggests, however, that this Court in Hoffman v. Bethlehem Steel Corporation,[9] has interpreted the instructions in *Accardi* to require courts to base their decisions in § 459 cases on improbable construc-

[8] 383 U.S. at 230.

[9] No. 72-1149 (3d Cir. April 3, 1973).

tions of labor contracts.[9a] The agreement in *Hoffman* granted to an employee one-half of a supplemental unemployment benefit (SUB) credit unit for each week in which he had "hours of work for the company." Thus, like the agreement in *Accardi,* the *Hoffman* contract contained an express provision that permitted a "bizarre result;" that is, an employee who worked one hour each week could accrue as much SUB credit as one who worked forty hours a week.

It is not clear that *Hoffman* relied solely on the slight possibility that the union and the employer contemplated such a "bizarre result" in concluding that this particular benefit was a prerogative of seniority. Under the agreement in *Hoffman* an employee would receive SUB credits if he were on vacation, on jury duty, performing responsibilities as a union officer, or receiving disability payments for a work-related injury.[10] An employee on a voluntary leave of absence could neither accumulate nor use such credits.[11] Thus, the Court was confronted with a contract granting employees on leaves of absence for certain enumerated reasons the right to accumulate SUB credits, while denying such right to employees on leaves for other reasons.[12] It could not be said,

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[9a] Brief for Appellant at 13–15.

[10] The agreement expressly precluded the accumulation of SUB credits by an employee while serving in the armed services "except as may otherwise be required by law." The Court apparently reasoned that this quoted language expressly contemplated that the contract would not affect the operation of § 459.

[11] It would be illogical, of course, for a laid-off employee to accrue SUB credits. Such an employee uses these credits at a rate of one per week of layoff. If he could at the same time accumulate credits, one purpose of the credit formula—to limit the company's liability for SUB's—would be, in part, defeated.

[12] See Haggard at 542 for a discussion of the resolution of some apparent inconsistencies created by the language of the statute regarding leaves of absence and furloughs.

therefore, that the accumulation of SUB credits was conditioned exclusively on the actual performance of work.

It would seem that the Court in Hoffman concluded that the policies of § 459, as expressed in *Accardi,* required it, in the specific factual setting there, to resolve in favor of the returning veteran the ambiguity in the contract as to whether the accumulation of SUB credits was a prerogative of seniority.

A close analysis of the SUB plan suggests a second possible distinction between *Hoffman* and the case *sub judice.* Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, subsection 459(c), interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

III

Foster asserts that even if the reasoning in *Accardi* and *Hoffman* do not mandate reversal here, the Su-

preme Court in Eagar v. Magna Copper Company [13] has determined that vacation benefits are to be regarded as prerogatives of seniority. In *Eagar* the collective bargaining agreement required an employee to work 75 per cent of his available shifts within the year and to be in the service of the company at the end of his "vacation earning year" in order to receive vacation benefits for that year.[14] Because the plaintiff had met the first prerequisite—he had worked 75 per cent of the available shifts—Eagar is not persuasive authority for the proposition that vacation benefits are under all circumstances prerogatives of seniority. *Eagar* does establish that should military service prevent an employee from working on a particular day, the last day of his "vacation earning year," he does not forfeit benefits that he has already earned and would receive but for that specific absence.[15] To this limited extent, vacation benefits are considered dependent on length of service, or, in alternative terminology, the veteran is regarded as being "continuously [employed] from the time of his entering the Armed Forces until the time of his restoration to such employment." [16]

[13] 389 U.S. 323 (1967) (per curiam), *rehearing denied* 389 U.S. 1060 (1968).

[14] Magna Copper Co. v. Eagar, 380 F. 2d 318, 319–20 (9th Cir. 1967).

[15] *See* Hollman v. Pratt & Whitney Aircraft, 435 F. 2d 983, 988 (5th Cir. 1970).

[16] 50 U.S.C. App. § 439(c)(2). In Morton v. Gulf, M. & O. R.R., 405 F. 2d 415 (8th Cir. 1969), the contract provided that the number of days of vacation to which an employee was entitled depended on the number of years of compensated service he had with the company. The court concluded that under this contract the amount of vacation did depend on length of service. There is no dispute as to the amount of vaca-

The Circuits, however, differ as to whether Eagar commands automatic classification of vacation benefits as seniority rights regardless of the fact that a particular collective bargaining agreement purports to condition the receipt of vacation benefits on the completion of a specified amount of work.

In Kasmeier v. Chicago, Rock Island and Pacific Railroad Company,[17] the Tenth Circuit declined to extend 1968 vacation benefits to an employee who worked 53 days during 1967 before entering the armed services, where the labor contract required "compensated service on not less than one hundred ten (110) days during the preceding calendar year." The court reasoned that *Eagar* did not control since the plaintiff there had met the work requirement.[18] This Court, in Dougherty v. General Motors Corporation,[19] a pre-*Eagar* case, refused to compel the payment of vacation benefits to a returning veteran in 1946, when the collective bargaining agreement required earnings in 1945, a year during which the veteran was a member of the armed services, to qualify for a vacation in 1946.[20]

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tion benefits for which Foster is presently eligible. Instead, Foster seeks vacation benefits for years credited to him for the purpose of computing his present benefits but for which he received no benefits.

[17] 437 F.2d 151 (10th Cir. 1971).

[18] *Id.* at 154–55.

[19] 176 F.2d 561 (3rd Cir. 1949).

[20] *See also* Dugger v. Missouri Pac. R.R., 403 F.2d 719 (5th Cir. 1968) (per curiam), *cert. denied*, 395 U.S. 907 (1969), *aff'g* 276 F. Supp. 496 (S.D. Tex. 1967) (failure to meet requirement that employee render compensated service on at least 110 days in preceding calendar year precludes the awarding of vacation benefits to employee who worked for only 85 days because of military service.

Dravo's counsel urged at oral argument that the reasoning and holding of *Dougherty* control here. We cannot, however,

The Ninth Circuit, on the other hand, in Locaynia v. American Air Lines,[21] seems to have held that vacation benefits are *ipso facto* prerogatives of seniority.[22] It appears, however, that the collective bargaining agreement in *Locaynia* did not provide that a specified minimum amount of work was prerequisite to the employee's vacation benefits.[23] In Ewert v. Wrought Washer Manufacturing Company,[24] the Seventh Circuit cites *Locaynia* and uses broad language [25] in sustaining the veteran's claim to vacation benefits. Again, however, the contract in *Ewert* did not contain the type of work requirement present and not met in *Kasmeier* and *Dougherty*.[26] Although it is possible to distinguish these cases from *Kasmeier,* for example, on the basis of differences in the terms of the labor

affirm the district court on the basis of *Dougherty* without giving careful attention to the impact, if any, of the intervening Supreme Court decisions in *Accardi* and *Eagar* on the precedential value of *Dougherty*.

[21] 457 F. 2d 1253 (9th Cir.), *cert. denied*, 409 U.S. 982 (1972).

[22] *See* Comments, Reemployment Rights: The Veteran and the Vacation Benefit, 52 B.U.L. Rev. 480 (1973).

[23] 457 F. 2d at 1254 n. 2.

[24] 477 F. 2d 128 (7th Cir. 1973).

[25] The court in *Ewert* stated:

> . . . Whatever one may conclude about the correctness of *Dugger* and *Kasmeier* with respect to the contracts there considered, we have no difficulty in concluding, under *Eagar's* application of *Accardi*, that the vacation rights under the contract in this case are prerequisites of seniority. Accordingly, it is unnecessary to decide that there are no conceivable contractual provisions under which vacation rights are so purely additional compensation for services actually rendered, and so independent of seniority that *Eagar* would not apply. *Id.* at 129.

[26] Ewert v. Wrought Washer Mfg. Co., 335 F. Supp. 512, 512 n. 1 (E.D. Wisc. 1971).

contracts, it is perhaps more candid to concede that a conflict in the Circuits does exist, since it appears that *Locaynia* and *Ewert* did not give more than cursory examination to the provisions of the collective bargaining agreement.

IV

We are thus faced with a difficult choice: (1) to eschew careful analysis of the collective bargaining agreements, implicitly admitting perhaps that courts are inherently incapable of engaging in the somewhat amorphous inquiry necessary to arrive at a just and reasonable construction of the terms of such contracts;[27] (2) or, to venture into that unclearly marked terrain of labor contract interpretation to determine whether the vacation benefits provided by particular agreements are rewards for length of service or additional compensation for work performed. If the former course is followed, then vacation benefits, at least with respect to the returning veteran, would always be considered prerogatives of seniority.

We conclude, instead, that it is our responsibility to give close attention to the contract and other related factors in reaching a determination whether the employer and the employees, through their respresentatives, viewed the particular benefit as additional compensation for work performed or a prerogative of seniority. In situations where a court does not have the fortuitous alternative of referring a dispute to someone, such as an arbitrator, more experienced in

[27] In *Ewert*, the court, although itself disdaining significant examination of the collective bargaining agreement, expressly rejected the apparent statement of the lower court that "vacation rights are always prerequisites of seniority and that there could be no contractual provisions under which vacation rights would fall into the class of other benefits." 477 F. 2d at 128–29.

dealing with the ambiguities and inconsistencies in labor contracts, we find no authority for the proposition that the court is to abdicate its responsibility to fashion a solution after searching inquiry and careful deliberation.[28] Although Congress by way of § 459, has thrust upon the courts controversies necessitating resort to labor contracts for their resolution, it has not directed them to abandon their normal procedures.

[28] We are aware that the task of interpreting labor agreements is an intricate and somewhat specialized one. When the contract provides for arbitration, the Supreme Court has instructed courts to refer disputes concerning the meaning and scope of substantive provisions to the arbitrator unless there is an "express provision excluding a particular grievance from arbitration" or "forceful evidence of a purpose to exclude the claim from arbitration." United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584–85 (1960). In reaching its decision in *Warrior & Gulf*, the Supreme Court noted that the collective bargaining agreement was, in a sense, *sui generis:*

> . . . It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant. *Id.* at 578–79.

The court added that the arbitrator might well introduce relevant considerations customarily ignored by courts when construing the provisions of a typical commercial contract. *Id.* at 581–82. See Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1487, 1500 (1959). However, in some situations, including the § 9 case before us, courts cannot escape from interpreting collective agreements. *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). *See generally* Note, Labor Injunctions, *Boys Markets*, and the Presumption of Arbitrability, 85 Harv. L. Rev. 636, 644–49. *Warrior & Gulf*, although raising questions as to judicial competence in this area, does not suggest that courts should woodenly construe labor contracts when the alternative of arbitral decision is unavailable.

In *Accardi*, the Supreme Court seems to have rejected any suggestion that it was to adopt a novel approach in § 459 cases.[29] In an earlier case, Aeronautical Lodge 727 v. Campbell,[30] the Court's language suggests the conclusion we reach here:

> It is . . . apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of seniority which the Selective Service Act guaranteed the veteran. Barring legislation not here involved, seniority rights derive their scope and significance from union contracts. . . .[31]

V

Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work week for any period of time without being discharged. Even assuming, for example, that a particular employee's job calls for ten hours of work per week, it is questionable that an arbitrator, or a court in the absence of an arbitration provision, would award such employee full vacation benefits under this contract. It appears quite likely that if this problem were raised during negotiations, the parties' understanding would comport with such a determination.

A more detailed examination of Foster's claim to vacation benefits and of the terms of the collective bargaining agreement, informed by an appreciation of

[29] *See* pp. 5–6, *supra;* Haggard at 571.

[30] 337 U.S. 521 (1949).

[31] *Id.* at 526.

the background understandings shared by the parties to labor contracts, supports the conclusion that the vacation benefits are not prerogatives of seniority.

It has been stipulated that from August 5, 1965 until his 1967 induction into the armed forces, Foster was employed by Dravo "as a scaler at an hourly rate of $2.62." Upon his release from military service he was "restored in his pre-service position . . . on or about October 7, 1968, at an hourly rate of $2.92." It also is stipulated that before and after military service Foster was recognized as enjoying "plant seniority" as of August 4, 1965, the date of his original hiring.

"Seniority," as used in this stipulation and generally in labor relations, is a priority factor that normally serves to protect workers' long term interest in job security by determining preference in such matters as advancement, layoffs and rehiring. Indeed, Article XIV of the labor contract that regulated Foster's employment defined "Seniority" as "the right of preference in layoffs or rehiring, measured by length of service in a job classification. . . ." Foster's interests of the type that are normally determined by seniority have been duly protected by measuring his seniority from the date of his original employment without interruption by reason of his military leave.

Vacation with pay, on the other hand, is normally and reasonably considered part of a worker's current or short term return for labor. Under this view, actual work time during a year provides a fair measure of the amount of annual vacation currently earned.[32] Ac-

[32] Seniority also may be consequence to the extent that a worker is allowed a shorter maximum vacation for his first or other early year of employment than for a subsequent year. It is not disputed here that the appellant is entitled to full seniority from the date of his original employment in determining how long a vacation he could earn during a particular calendar year.

cordingly, the labor contract in this case measures the amount of paid vacation that a worker has earned on a basis different from seniority.

The contract specifies that to qualify for the maximum allowable annual vacation a worker must have "received earnings" in 25 work weeks during the immediately preceding calendar year. Thus, it is reasonable to treat the vacation pay that the employer provides as deferred compensation for work recently performed. But during about nine months of each of the years in question here [33] Foster was a soldier and the army was responsible for his pay, on leave as well as during duty. To allow him at the same time to accrue civilian vacation credit in anticipation of his return to civilian employment would be inconsistent with, or at least an anomalous exception to, the general concept of earned vacation. Accordingly, section 459 (c) is fairly and reasonably construed as not obligating the civilian employer to confer that benefit upon the returning soldier unless it is the employer's practice to accrue vacation pay credits for employees during similar periods of uncompensated leave granted for reasons other than military service. It is neither alleged nor indicated by the record that the present employer has engaged in any such practice.

This case does not present a dilemma like the one this Court faced in *Hoffman*—some employees on leaves of absence received SUB credits under the agreement while others did not. Hence, we need not rely on the general Congressional policies undergirding § 459 in order to resolve an ambiguity created by inconsistent treatment of situations similar to the veteran's in the collective bargaining agreement. Further, as we have already indicated, the essential char-

[33] The claim here covers vacation pay for the full calendar years during which the appellant entered and left military service.

acter of the respective benefits at issue in *Hoffman* and this case are significantly different.

Moreover, there are not present here circumstances where the veteran has barely failed to qualify for full benefits under the language of the contract.[34] Close adherence to the contractual language will not therefore be manifestly unjust and there is little danger that such adherence will promote disharmony between the employer and the employee.

In sum, we hold that the terms of this collective bargaining agreement require twenty-five full work weeks,[35] and Foster's failure substantially to comply in this case precludes his claim to full vacation benefits. This result is consistent with the general purpose of § 459 to assure that the veteran when he returns to his pre-induction employment relationship is not disadvantaged vis-a-vis fellow employees who did not enter the military service. To hold that in this case Foster is entitled to vacation benefits, we would, in effect, be granting to the returning veteran a windfall at the expense of his employer and be discriminating against employees who are required to meet the conditions of the collective bargaining agreement if they are to receive vacation benefits. This outcome would be contrary to the intent and logic of § 459.

VI

Our determination that Foster is not entitled to full vacation benefits under the collective bargaining agreement does not prevent his asserting a claim for pro rata vacation benefits under the provision of the con-

[34] *Cf.* Dugger v. Missouri Pac. R.R., 403 F.2d 719 (5th Cir. 1968) (per curiam), *cert. denied*, 395 U.S. 907 (1969), *aff'g* 276 F. Supp. 496 (S.D. Tex. 1967).

[35] *See* Fees v. Bethlehem Steel Corp., 335 F. Supp. 487 (D.C.W.D. Pa. 1971); Bradley v. General Motors Corp., 283 F. Supp. 481 (E.D. Mo. 1968).

tract providing for such benefits.[36] The district court did not decide whether Foster is entitled to such benefits.

Although the complaint contains a general claim for vacation benefits, there is no specific averment relating to the pro rata benefits. The distinguished district court judge, however, after Foster's counsel adverted to the provision relating to pro rata benefits, urged the parties to reach a compromise apparently along lines suggested by the language of that provision.[37] In light of these conflicting circumstances, revealed in the record, we believe an appropriate course is to remand for a determination whether the question of Foster's rights to pro rata benefits was properly raised in the district court and, if so, for a decision on the merits of his claim to pro rata benefits.

Accordingly, the judgment will be vacated and the case remanded for action in conformity with this opinion.

HASTIE, *Circuit Judge*, concurring.

I agree and add only that, in my view, the considerations that are decisive in this case and should be most helpful to district judges in distinguishing advantages of seniority from "other benefits" under Section 459(c), are those set out in Part V of Judge Adams' opinion.

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[36] Article XIV, section 2 of the collective bargaining agreement provides, in part, as follows:

> However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked (25) weeks or more.

[37] Transcript at 65–79a.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 73-1083

EARL R. FOSTER, APPELLANT

v.

DRAVO CORPORATION

(D.C. Civil No. 71-781)

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: HASTIE, VAN DUSEN and ADAMS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 3, 1972, be, and the same is hereby vacated and the cause remanded for action in conformity with the opinion of this Court.

ATTEST:

T. F. QUINN,
Clerk.

Dated: December 26, 1973.

Certified as a true copy and issued in lieu of a formal mandate on January 24, 1974.

Test: Thomas F. Quinn, Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX C

In the United States District Court for the Western District of Pennsylvania

CIVIL ACTION NO. 71–781

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

OPINION AND ORDER

This is a civil non-jury proceeding by which plaintiff seeks to compel defendant to pay him vacation benefits pursuant to § 9(d) of the Selective Service Act of 1967, 50 U.S.C.A. § 459(d).

Based on the stipulation of counsel, plaintiff, Earl Foster, began full time employment with defendant on August 5, 1965, and has seniority with the company from this date. On March 6, 1967, this employee was given a leave of absence to be inducted into the military. After an honorable discharge, plaintiff made timely application for and was reinstated to his former job on October 7, 1968. Foster worked nine weeks and thirteen weeks respectively in 1967 and 1968, the years for which vacation pay is sought, although had he not been in the military he would have worked without any layoff. The question presented is whether plaintiff is entitled to vacation benefits for the years in question in spite of the requirement contained in the pertinent collective bargaining agreement that an employee, to be eligible for vacation benefits, must have had earnings in twenty-five weeks in the twelve months immediately

preceding the current December 31st. In view of plaintiff's failure to satisfy said requirement, it is the considered judgment of this Court that he is not entitled to any vacation benefits for the years in question.

The Court has had occasion to consider this question previously in *Fees* v. *Bethlehem Steel Corporation,* 335 F. Supp. 487 (W. D., Pa. 1971). Therein it was held that an individual must satisfy contractual work requirements to obtain vacation benefits, provided such requirements do not penalize a veteran for his military service. See also *Dougherty* v. *General Motors,* 176 F. 2d 561 (3d Cir., 1949), cert. denied 338 U.S. 956 (1950). As in *Fees, supra,* there is nothing in the present contract which would detract from the automatically accruing rights of returning servicemen. Accordingly, there is no basis for concluding that plaintiff has been denied any rights to be accorded honorably discharged military personnel under the Selective Service Act of 1967.

Findings of fact and conclusions of law have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

An appropriate order is entered.

ORDER

AND NOW, this 3rd day of November 1972, it is ordered that judgment be and hereby is entered in favor of defendant, Dravo Corporation, and against plaintiff, Earl R. Foster.

WALLACE S. COURLEY,
Senior District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974